

United States
Circuit Court of Appeals ⁵
For the Ninth Circuit.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LIMITED,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,
Appellee.

CERTIFIED COPIES OF CERTAIN
OPINIONS AND DECREES.

Upon Appeal from the United States District Court for the District
of Arizona.

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3012.

KOKE COMPANY OF AMERICA, SOUTHERN
KOKE COMPANY, LTD., KOKE COM-
PANY OF TEXAS, KOKE COMPANY OF
ARKANSAS, and KOKE COMPANY OF
OKLAHOMA,

Appellants,

vs.

THE COCA-COLA COMPANY,

Appellee.

**Petition of Appellee for Leave to File Certified
Copy of Decision of Examiner of Interferences,
etc.**

Now comes The Coca-Cola Company, appellee
herein, and respectfully shows to the Court as
follows:

That on the 26th day of December, 1913, The Coca-Cola Company, appellee herein, filed a notice of opposition in the Patent Office at Washington under Section 6 of the Act of February 20, 1905, entitled "An Act to authorize the registration of trademarks used in commerce with foreign nations, or among the several States of the United States, or with Indian tribes, or to protect the same," to the application of the Koke Company of America to register the word "Koke" under the said Act; that The Coca-Cola Company, opposer therein, is the same corporation as The Coca-Cola Company, ap-

pellee herein; that applicant therein is the same corporation as the Koke Company of America, one of the appellants herein and alleged licenser of the remaining appellants herein for the rights claimed by them in the said word "Koke," and the said word "Koke" is the same mark involved herein and the goods upon which it was claimed to be used were the same goods as those involved in this proceeding; that the alleged date of first use of the name "Koke" in the application of the Koke Company of America to the Patent Office was the year 1888; that the basis of the said opposition to said application for registration by said Koke Company of America by said Coca-Cola Company, appellee, in said proceeding was that the registration and use of said word "Koke" would cause damage to the opposer, Coca-Cola Company, because it was an abbreviation of opposer's mark "Coca-Cola" and a recognized nickname of its product and enabled the sale of applicant's product as and for Coca-Cola, the product of appellee. After certain interlocutory proceedings, an answer was filed in said opposition which raised substantially the same issues as those raised by the answer herein as to the word "Koke." Testimony was taken under stipulation and order whereby the testimony was to be taken but once and filed in this cause and in the proceeding in the Patent Office, and, accordingly, all of the testimony of The Coca-Cola Company filed in this cause was filed in the Patent Office, and all of the testimony taken on behalf of the Koke Company of America was filed by The Coca-Cola Company in the proceeding in the Patent Office. The Koke Com-

pany of America, however, printed such portions of the testimony as had to do with the word "Koke" and its alleged rights therein. A copy of the record presented on behalf of the Koke Company of America is herewith submitted and if desired will be filed in connection with this petition.

On May 24, 1916, the Examiner of Interferences decided the controversy, holding that the attempted registration of the word "Koke" by the Koke Company of America was an effort to appropriate a nickname for "Coca-Cola," was a fraud and refused the application for registration of the Koke Company of America. A certified copy of said decision is annexed hereto and a printed copy thereof is Appendix IV to the brief on behalf of The Coca-Cola Company, appellee herein, at page 159 thereof. An appeal was taken by the Koke Company of America to the Commissioner of Patents, who, on August 14, 1917, affirmed the decision of the Examiner of Interferences therein. A certified copy of said decision is annexed hereto and a printed copy thereof is Appendix V to the brief on behalf of The Coca-Cola Company, appellee herein, at page 180 thereof. Thereupon, the Koke Company of America filed a petition for appeal and assignment of errors in the Court of Appeals of the District of Columbia which is the appellate tribunal for said proceeding. Said proceeding was accordingly docketed in the said court of Appeals as No. 1151, Patent Appeal Docket, October Term, 1917. On January 5, 1918, in pursuance of the 19th Rule of the said Court the said appeal was dismissed by order of the Court of Appeals of the

District of Columbia, which order is final and still remains in full force and effect. A certified copy thereof is annexed hereto.

At about the same time of the institution of this cause in the United States District Court, for the District of Arizona, The Coca-Cola Company filed its bill of complaint in the United States District Court for the Eastern District of Louisiana, Northern Division, against Southern Koke Company, Ltd., James L. Wright and James C. Mayfield, its officers, and a bottler, The Crescent City Seltz & Mineral Water Company. Said Mayfield is the same person as the alleged predecessor in title of the Koke Company of America and the Southern Koke Company, Ltd., is a party defendant herein, and the alleged licensee of the Koke Company of America; after certain interlocutory proceedings, issue was joined in said last-named proceeding and the pleadings and issues therein were substantially identical with the pleadings and issues in the said proceeding in the United States District Court of Arizona, from which this appeal is taken, and the cause was submitted and heard upon the same evidence and record as in said District Court of Arizona proceeding and in this proceeding, and on the 24th day of May, 1917, a decree was entered by the Honorable Rufus E. Foster, Judge, in said proceeding in the District Court of Louisiana, a certified copy of which is annexed hereto, and a printed copy thereof is Appendix III to the brief on behalf of the Coca-Cola Company, appellee herein, at page 156.

All of the above-certified copies of orders and de-

crees referred to in this petition are made part and parcel thereof. The said proceeding in the United States District Court for the Eastern District of Louisiana, Northern Division, was set for hearing upon the motion of the defendants therein, was argued and decided on the merits after oral argument and briefs for all parties. Said decree therein remains wholly unmodified and unappealed from and in full force and effect and the time within which an appeal can be taken therefrom has elapsed. There was no understanding that said decree was or is to remain interlocutory or that the same is to be modified later so as to conform to the decree which this Court finally directs to be entered.

The proceeding entitled United States vs. Forty Barrels and Twenty Kegs of Coca-Cola, was terminated on the 12th day of November, 1917, by the entry of a decree in the District Court of the United States, Eastern District, Southern Division of Tennessee, a copy of which is annexed.

In the case of Coca-Cola vs. Benjamin Duberstein et al., pending in the United States District Court, for the Southern District of Ohio, Western Division, on the 19th day of March, 1918, an opinion was handed down by the Honorable Howard C. Hollister, Judge of said Court, and on Monday, the 1st day of April, 1918, a final decree was entered therein. Certified copies thereof are hereto annexed.

Petitioner, The Coca-Cola Company, appellee herein, prays for leave to file in this proceeding and make part of the record the documents, decrees and orders herein referred to, that due effect may be

given in this proceeding to each and all of said decrees and orders, and such other relief as may be just and equitable in the premises.

COCA-COLA COMPANY,
By EDWARD S. ROGERS,
Petitioner.

State of Illinois,
County of Cook,—ss.

Edward S. Rogers, being duly sworn, deposes and says that he is one of the solicitors and counsel for The Coca-Cola Company, appellee herein; that he has personal knowledge of the affairs set out in the petition and that the statements in said petition are true.

EDWARD S. ROGERS.

Subscribed and sworn to before me this 27th day of April, A. D. 1918.

[Seal]

LORETTO M. REEVE,
Notary Public.

Certified Copy of Decision of Examiner of Interference in Coca-Cola Co. v. Koke Co., No. 1424.

2—390.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of the Decision

of the Examiner of Interferences dated May 24, 1916,
in the matter of

Opposition

Number 1,424,

The Coca-Cola Company,

vs.

Koke Company,

Trademark for Refreshing Non-Alcoholic Beverage not in the nature of a Food and a Soda Fountain Syrup.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 8th day of September, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-second.

[Seal]

R. F. WHITEHEAD,

Acting Commissioner of Patents.

Final Hearing

December 6, 1915.

Paper No. 102.

JHD.

IN THE UNITED STATES PATENT OFFICE.

Opposition No. 1,424.

The Coca-Cola Company,

vs.

Koke Company of America.

Application No. 71,308, filed June 23, 1913, published
December 9, 1913.

Refreshing Non-alcoholic Beverage not in the nature
of a food and a soda-fountain syrup.

Messrs. HAROLD HIRSCH, FRANK F. REED,
EDWARD S. ROGERS, F. L. BROWN and
FRANCIS M. PHELPS, for The Coca-Cola
Company.

Messrs. F. T. F. JOHNSON and JOSEPH W.
BAILEY, for the Koke Company of America.
AUGUSTINE B. LITTLETON, on brief.

The applicant is seeking to register the word
"Koke" as a trademark for "a refreshing non-
alcoholic beverage not in the nature of a food and a
soda-fountain syrup" (applicant's statement).

The opposition, as originally filed, was based upon
the ground, briefly stated, that "Koke" is a

"deceptive imitation in sound, appearance and
suggestion of Opposer's said trademark name
'Coca-Cola.' "

The ground of opposition now chiefly relied upon
by the opposer (opposer's brief, page 1) is

"that the mark of the applicant is deceptive and
should not be registered because Koke is a com-
mon abbreviation of opposer's trademark Coca-
Cola and a familiar nickname for opposer's
product."

The ground of opposition, in the form now relied
upon by the opposer, was substituted, for that origi-
nally alleged, by an amendment to the notice of oppo-
sition, filed more than thirty days after the publica-
tion of the mark sought to be registered (Amendment
filed August 3, 1914, and modified during the pro-
ceedings before the Commissioner on appeal).

It is urged, in behalf of the applicant (applicant's
brief, page 108), that the amended notice of opposi-

tion sets up a new cause of action which was not pleaded in the notice of opposition as originally filed. This point was duly raised by the applicant when the motion to amend the notice of opposition was present by the opposer and was decided in applicant's favor by this tribunal (Decision of August 21, 1914). On appeal, the decision of this tribunal was reversed by the First Assistant Commissioner, and the amendment, in a slightly modified form, was entered as a basis for further proceeding (Decision of September 5, 1914). The decision of the first Assistant Commissioner to the effect that the amended notice of opposition does not set up a new cause of action is controlling in its effect upon this tribunal. Further consideration of the merits of that question as a basis for the decision now to be rendered in this case would, therefore, be unwarranted.

The applicant contends that the amended notice of opposition does not state a valid cause of action (applicant's brief, page 8). It is urged that the only valid grounds for refusing registration are those defined in section 5, of the trademark act of February 20, 1905 (as amended), and that the alleged use by the general public of the word "Koke" as an abbreviation of or nickname for "Coca-Cola" does not correspond with any of the grounds named therein, but, at the most, amounts to nothing more than an allegation of unfair competition. This point was raised by the applicant in support of its motion to dismiss the opposition, filed September 18, 1914. In deciding that motion (decision of October 3, 1914) it

was ruled by this tribunal, without passing upon the merits of the specific question thus presented, that the amendments which had been made to the notice of opposition, were not such as to materially change the nature of the proceeding which, as originally filed, was based upon a satisfactory allegation of similarity between the words "Koke" and "Coca-Cola." The first Assistant Commissioner (decision of January 13, 1915) affirmed the decision denying the motion to dismiss but based his action upon entirely different grounds. He overruled applicant's contention that an opposition should be dismissed unless the grounds set up as a bar to registration are found in section 5 of the trademark act, and held that other grounds of damage may be relied upon as a basis for opposition under the broad provisions in section 6. The question of opposer's right to rely upon the original allegation of similarity between "Koke" and "Coca-Cola" was not mentioned.

That an opposition may be sustained and registration refused on grounds other than those specifically defined in section 5 of the trademark act has recently been decided by the First Assistant Commissioner in his decision in *Opposition No. 1,641, Western Clock Co. vs. Sears Roebuck and Co.* (117 MS. D. 465). In that case the opposer alleged that it had manufactured and sold clocks under the trademark "Big Ben," but that it had also advertised such clocks under the trade name "National Call," which had become generally known to the public as an identifying name for opposer's goods. It was held by the acting examiner of interferences that the facts alleged in

the notice of opposition, if established, would not constitute a statutory bar to the registration of the name "National Call" to one who had used it as a trademark, because the ground of opposition relied upon by the opposer did not correspond with any of the reasons for refusing registration defined in section 5 of the trademark act, and that no other grounds for refusing registration should be recognized by the patent office. The decision of the acting examiner of interferences in that case was reversed by the above cited decision of the First Assistant Commissioner, in which it was said:

"This case (*Western Clock Co. v. Sears Roebuck and Co.*, *supra*) seems to be practically on all-fours with that of *The Coca-Cola Co. v. Koke Company of America*, decided by me January 13, 1915."

Both of the above-mentioned decisions of the First Assistant Commissioner are printed in full in Opposer's brief (pp. 215 to 220).

In view of the above-cited decisions of the First Assistant Commissioner, one rendered in this case, and the other in the case of *Western Clock Co. v. Sears, Roebuck & Co.*, a ruling by this tribunal to the effect that the amended notice of opposition does not state a valid ground of opposition, as contended by applicant, would be unwarranted. Applicant's alleged right to registration and opposer's alleged damage must therefore be determined from the evidence which has been introduced in support of the facts pleaded in the notice of opposition and applicant's answer thereto.

That the beverage for which applicant is seeking to register "Koke" as a trademark and the product which the opposer sells under the name "Coca-Cola" are merchandise of the same descriptive properties, as that term is used in trademark law, is not controverted. The decision to be rendered in this case is therefore dependent solely upon the alleged conflicting use of the marks "Coca-Cola" and "Koke" in connection with the manufacture and sale of such goods.

It is satisfactorily established by evidence introduced by both parties to this proceeding that "Coca-Cola" was made and sold in small quantities by one J. S. Pemberton, of Atlanta, Georgia, at least as early as the year 1887. The Coca-Cola Company in its notice of opposition, alleged title through mesne assignments from said Pemberton. The applicant, in its answer, alleged that its predecessors in business, acquired some interest in Coca-Cola from the same J. S. Pemberton, and evidence has been introduced in support of such claim. According to this testimony J. S. Pemberton was doing business in 1887 under the name "Pemberton Chemical Company" and, as a part of that business, was making and selling Coca-Cola. In 1888 he entered into partnership with J. C. Mayfield, E. H. Bloodworth, and A. A. Murphy, after which the business was continued under the name "Pemberton Medicine Company." The applicant claims that the Coca-Cola business was understood to be a part of the consideration advanced by Pemberton when the partnership was formed. This claim, in behalf of the appli-

cant, to the effect that a predecessor of the Koke Company of America acquired some interest in the Coca-Cola business, as a result of a transaction which occurred in 1888, is held to be of no importance in view of testimony relative to subsequent events introduced and relied upon by the applicant. The substance of that testimony is to the effect that a controversy arose between Pemberton and the other members of the Pemberton Medicine Company soon after the partnership was formed at which time Pemberton announced that he had agreed to let his son have the Coca-Cola business (Applicant's Record, pp. 391 and 777), and that, although the other partners did not consent to the surrender of Coca-Cola, they nevertheless agreed to adopt a different name for the product which had previously been sold as such (Applicant's Record, pp. 391 and 778). That was in 1888 and there is no evidence of record that the applicant or any of its alleged predecessors afterwards used or attempted to use the name "Coca-Cola." If applicant's predecessors ever had any interest in the mark "Coca-Cola," as to which no opinion need be expressed, it is held that they abandoned the same by intentionally and deliberately discontinuing its use in 1888 and by failing to resume such use during the following twenty-seven years (J. C. Mayfield, Sr., XQs. 1224, 1225). Moreover, the opposer has introduced testimony and documentary evidence relied upon to perfect a continuous chain of title to and continuous use of "Coca-Cola" from 1887 to the present time. That evidence has been abstracted and tabulated on pages 119 to 135 of

opposer's brief. That it is sufficient for the purpose, if opposer's title to "Coca-Cola" is at all material to this case, appears to be conceded, and will be so regarded, since applicant has not questioned the same in its brief. It is therefore deemed to be unnecessary to make any detailed analysis of the evidence which has been introduced by the opposer to establish its title to "Coca-Cola" or of that which has been introduced in behalf of the applicant for the apparent purpose of impairing the same.

The opposer has not established, by the evidence which has been introduced, and does not appear to have attempted to establish, that any person has ever been misled as a result of any similarity or resemblance between the marks "Coca-Cola" and "Koke," into a purchase of applicant's goods believing them to be the goods of the opposer. In the absence of such proof, and in view of the fact that both parties have been actively engaged in a competitive business for a number of years, it should not be assumed that there is any likelihood of confusion, as originally alleged by the opposer, because of any resemblance which the mark "Koke" bears to the mark "Coca-Cola." It is therefore held that the opposer is dependent upon the allegation of the amended notice to the effect that "Koke" is a common abbreviation and familiar nickname which has been adopted and used by the public as a means of distinguishing opposer's goods from other goods of the same descriptive properties.

The opposer has introduced the testimony of numerous witnesses located in different sections of the

country to the effect that customers at soda-fountains who ask for Koke accept Coca-Cola without objection. In many instances such customers, when asked if they meant Coca-Cola, answered in the affirmative. Some of the witnesses testified that, to their recollection, "Koke" had been used as a nickname for "Coca-Cola" for as much as twenty or twenty-five years. No attempt will be made to make a detailed analysis of the mass of testimony which has been introduced to establish this point of opposer's case. It is objected to by the applicant on the ground that it is the testimony of interested witnesses and to a certain extent that is true. Much of it is the testimony of detectives employed by the opposer and sent to different parts of the country for the express purpose of collecting evidence. Much of it is the testimony of customers of The Coca-Cola Company. Some of it must be entirely disregarded on the ground that it is mere hearsay. Some was properly objected to on the ground that it was given in response to leading questions. A large proportion of this evidence, however, is free from objection, other than that it is the testimony of witnesses who, as customers or employees, are more or less interested in the success of the Coca-Cola Company as a commercial institution. No good reason has been shown why such evidence should not be accepted as true. It has been abstracted and tabulated, for convenient reference, on pages 137 to 171 of opposer's brief. It has not been satisfactorily rebutted and counsel for applicant do not contend that the word "Koke" has not been so used.

The argument relied upon by applicant is that "Koke" is in many instances used by the public in a generic sense as a name for any of fifty or more cola drinks which may be found for sale on the market (Applicant's Brief, pp. 162, 163, 167, 168), and that to such extent as "Koke" is used by the public as a name for "Coca-Cola" such use should not be regarded as having originated because of any similarity between the marks "Koke" and "Coca-Cola," but because of an alleged general impression that "Coca-Cola" contained some sort of powerful, habit-forming drug such as cocaine (Applicant's Brief, pp. 156, 157). It will therefore be regarded as an established fact, for the purpose of deciding this case, that the word "Koke" has been used quite generally for many years in certain sections of the country, and particularly in Texas, as an abbreviation or nickname, intended to distinguish opposer's goods from goods of like descriptive properties.

The arguments which have been advanced in Applicant's Brief (pp. 157, 163, 167, 168, 252), to the effect that "Koke" is a generic term used by the public as a nickname for any one of a class of fifty or more beverages to be found on the market, is based, in part at least, on testimony which is not a part of the printed record. By agreement of the parties, approved by the Patent Office, the testimony in this case was taken contemporaneously with the testimony in certain court proceedings pending between the same parties. Certain testimony taken by the applicant was not entitled as testimony to be used in this proceeding before the Patent Office. A type-

written copy thereof was introduced by the opposer but was not printed. This testimony might have been used by either party, had it been printed as required by the rules. Because neither party printed the same it was ruled at the hearing, after reading the agreements relative thereto (Applicant's Record, page 66; Applicant's Brief, pp. 157 to 161), that the unprinted testimony should not be considered in behalf of either party to the interference.

Applicant's argument to the effect that "Koke" is a generic term used by many persons as a name for a class of drinks is not dependent solely upon the unprinted portion of applicant's record. Evidence in support of such a use of that term is to be found in the printed records of both parties (see testimony of Boylin, Qs. 52 to 64, Applicant's Record, pp. 216, 217; Sidebottom, XQs. 110, 111, Applicant's Record, p. 254; Brown, Q. 14, Opposer's Record, p. 1039; Christy, XQs. 135, 136, Opposer's Record, p. 1903). Moreover, to such extent as the use of "Koke" as a generic term or name for a class of drinks may be found to constitute a reason for refusing to register the same as a trademark, the use in that sense may be regarded as formally admitted by counsel for applicant (Applicant's Brief, pp. 157, 163, 167, 168).

In view of the rulings which have been made to the effect that the word "Koke" is used to a material extent by persons desiring to purchase coca-cola, and that the same word is frequently used as a generic term or name for a large class of drinks, the applicant's right to register is held to be dependent upon proof that "Koke" was used as a distinguish-

ing mark for applicant's goods prior to the time at which the public began to use that word either as a nickname for "Coca-Cola" or as a generic name for any cola drink (*Stachelberg et al. v. Ponce*, 128 U. S. 686; 46 O. G. 337; *Corbin v. Gould*, 133 U. S. 308; 51 O. G. 622; *Denver Chemical Mfg. Co. v. Lilley et al.*, 216 F. 869). Even should it be found that applicant's alleged prior use is established by the evidence, applicant's right to register may be defeated by proof of abandonment at a subsequent date. The evidence bearing upon these features of the case will now be taken up for consideration.

The applicant has introduced testimony to establish an adoption and use of "Koke" as a distinguishing mark for goods sold by its predecessors as early as the year 1888. If such use is established it would doubtless entitle applicant to register in the absence of evidence of abandonment. Few of the many witnesses who testified as to the use of the word "Koke" as a nickname for "Coca-Cola" attempted to carry such use back farther than from ten to fifteen years and such dates were not established by association with other events or by documentary evidence. A ruling that the word "Koke" was so used to any material extent, prior to the year 1900 would doubtless be unwarranted in view of the testimony upon which it must be based. On the other hand, the opposer contends that the use of "Koke" as a mark for applicant's goods is not established at a date earlier than the year 1909. Use of the word "Koke" at that late date would not entitle applicant to regis-

ter because of the earlier use of the same word as a nickname for "Coca-Cola."

The history of the adoption and use of "Koke" as a name or mark for applicant's product will first be very briefly outlined in accordance with the testimony of J. C. Mayfield, Sr., given during his examination as a witness for applicant. This witness, J. C. Mayfield, Sr., president of the applicant, Koke Company of America, will hereinafter be referred to as "Mayfield," as a convenient means of distinguishing between him and his sons, whose names will be given in connection with their respective initials.

According to Mayfield's testimony, the Pemberton Medicine Company, of Atlanta, Georgia, at the time that partnership was formed, took over Pemberton's entire business including the manufacture and sale of Wine of Coca, Coca-Cola, Globe Flower Cough Syrup, Indian Queen Hair Dye, and several other remedies and preparations. Mayfield testified that he got the coca-cola formula directly from Pemberton, who explained it to him and permitted him to copy it in a note-book. According to his testimony the Pemberton Medicine Company, as a part of its regular business, continued to manufacture and sell Coca-Cola for a few months, after which a dispute arose between Pemberton and the other partners, Murphy, Bloodworth, and Mayfield, as to the company's right to Coca-Cola, and before the end of the year 1888 it was decided that the Company should discontinue the use of the name "Coca-Cola" and market the same product under the name "Koke." Before the end of that year Murphy retired and

Pemberton died. A settlement was made for the purpose of closing out the Pemberton interest, as a result of which Mrs. Pemberton received the formula to the Indian Queen Hair Dye and one-third of the manufactured stock on hand. The business was then continued by Mayfield and Bloodworth.

Mayfield testified that at some time between the years 1890 and 1892, it was decided to get rid of the patent medicines and push "Koke" only. At about this time he claims to have met an old friend named Ealey, who became interested in the "Wine of Coca" and in 1893 a separate company, the Wine of Coca Company, was organized to take over that preparation. In 1895, Mayfield claims to have bought out Bloodworth and to have continued the business in Atlanta as sole proprietor until about the end of the year 1898.

About the end of the year 1898 Mayfield claims to have left Atlanta. He first did a little manufacturing in New Jersey and between the years 1899 and 1909 he became interested in various business establishments in Birmingham, Nashville, and St. Louis. When he went to Birmingham, in 1899, he succeeded in interesting one Brittain in his new drink "Celery-Cola," with which he claimed to have been experimenting in Atlanta. He and Brittain then started a bottling business for the purpose of exploiting "Celery-Cola." From this time on Mayfield claims to have manufactured and sold both "Celery Cola" and "Koke" continuously until 1909 in some one or more of the establishments with which he was connected in the above-mentioned cities. That "Koke"

has been used by Mayfield and the companies with which he has been associated since 1909 does not appear to be disputed (Opposer's Brief, p. 11). This admitted use of applicant's mark during the last six years and the various business organizations with which he has been associated in Texas, Louisiana, and elsewhere, are not at issue in this proceeding and need not be discussed.

That the Pemberton Medicine Company, of Atlanta, Georgia, made and sold, during the period from 1888 to 1898, in containers bearing the label "Koke," a product which was used in the making of a soda-fountain beverage, is held to be established. This ruling is in no manner dependent upon the testimony of Mayfield, himself. It is based upon the testimony of several competent witnesses including one of the original partners, Murphy (Applicant's Record, p. 393); a daughter and a son-in-law of another of the original partners (Banks, Applicant's Record, pp. 516, 525; Miss Marian Bloodworth, applicant's Record, pp. 347, 351, 356, 357), and a friend who visited Mayfield from Alabama about 1892 or 1893 (Holley, Applicant's Record, pp. 373, 374). These witnesses have not been impeached and there is no apparent reason why their testimony should not be accepted as true.

Evidence has been introduced in behalf of the applicant which is believed to warrant the conclusion that Mayfield continued to make and sell a beverage of some kind under the name "Koke" for a short period at least after he left Atlanta. McGraw, an Alabama bottler, testified (Applicant's Record, pp.

421, 422) that he has bottled Koke purchased from Mayfield, "off and on" (Applicant's Record, p. 422) ever since about the year 1900. He admitted that he had lost track of Mayfield at times and has been unable to get the product for periods of time, the extent of which is more or less uncertain. He testified, however, that he bottled and sold Koke during the years 1900, 1901, and 1902, and gave a list of several of his customers (Applicant's Record, pp. 432, 433). It would seem that this testimony as to sales of Koke in 1901, 1902, and 1903, might have been rebutted if not true.

The applicant has introduced the testimony of numerous witnesses to the effect that he continued to manufacture and sell "Koke" during the years 1904 to 1909 when, according to his own testimony, he was most interested in "Celery-Cola" (Applicant's Record, p. 906). The testimony of many of those witnesses is too uncertain and indefinite to be given any weight as evidence.

Casey first testified that Mayfield was selling Koke twelve years ago (Applicant's Record, p. 416). He then testified that he meant eight or nine years (Applicant's Record, p. 418); then said it was "about eight years" (Applicant's Record, p. 418); and admitted that he could not remember the year or date.

Sidebottom testified to knowledge of the use of Koke by Mayfield for eighteen years (Applicant's Record, p. 246). On cross-examination he cut the time down to twelve or fourteen years (Applicant's Record, p. 258) and then admitted that he could not

remember "Koke," but confused the same with "Cola" (Applicant's Rec., p. 259).

Freed, on direct examination, testified that he had bought Koke from Mayfield continuously since about thirteen years ago (Applicant's Rec., p. 262). On cross-examination he first admitted that he did not know anything about "Koke" either as an extract or as a syrup until about seven years ago (Applicant's Rec., pp. 275, 276), and then admitted that he could not remember about "Koke" (Applicant's Rec., pp. 290, 293).

Mayfield's son, S. T. Mayfield, testified that his father continued to manufacture "Koke" at Birmingham until 1908 (Applicant's Rec., p. 545). Although he claims to have been on the road for his father from 1903 until 1908 (Applicant's Rec., pp. 545, 571, 581), selling Koke, Celery-Cola, etc. (Applicant's Rec., p. 588), he could not remember the names of any of the customers to whom he sold Koke (Applicant's Rec., p. 591).

Another of Mayfield's sons, J. W. Mayfield, also claims to have been on the road selling "Koke" for his father from 1903 to 1907 (Applicant's Rec., p. 641), but could not name any of their Koke customers (Applicant's Rec., pp. 686, 690).

But it is deemed unnecessary to make a detailed analysis of the many witnesses who were examined in behalf of the applicant in view of the admissions and contradictory testimony of Mayfield, himself, through whom the applicant claims title, as its immediate predecessor. Mayfield is now the president of the Koke Company of America and must be regarded as

having been at all times, since its first alleged adoption and use, the person most interested in the success of Koke. His conduct and admissions, so far as they raise presumptions which are against the interest of the applicant, must be regarded as of more weight than indefinite and conflicting testimony of other witnesses. It will be shown that his own testimony in support of the applicant's case must be ignored and that his conduct and admissions during the period from 1904 to 1909, and subsequent thereto, as established by the record, warrant the conclusion that he abandoned Koke some time between 1903 and 1909, during which period he was pushing Celery-Cola.

The conclusion that Mayfield is not to be relied upon as a witness in behalf of the applicant and that his testimony in support of applicant's case must be disregarded is clearly warranted in view of his answers to questions asked him when examined as a witness for the opposer during the taking of its testimony in rebuttal. The opposer had introduced evidence to the effect that in the year 1907 one of Mayfield's employees, Rice, had been prosecuted for the alleged theft from Mayfield of a formulae book and some of his stock in trade. On direct examination Mayfield was asked if he were present at the hearing of the case of State v. Rice and had answered (Applicant's Rec., p. 937) "No." After the opposer had established, by evidence in rebuttal, that Mayfield was present and testified in that case, Mayfield offered the explanation that the record is erroneous

and that he had actually answered "Yes" (Opposer's Rec., 2694).

The opposer, in its brief (pp. 36 to 47), has tabulated extracts from Mayfield's testimony as a convenient means for comparing that which he gave in the case of *State v. Rice*, with that given in this case; first, as a witness for the applicant, and subsequently as a witness in rebuttal for the opposer. It is unnecessary, however, to enter into any detailed discussion relative to the contradictions and inconsistencies to be found in Mayfield's testimony or of the testimony which he has submitted in explanation of the same. His conduct as a witness in rebuttal for the opposer is alone sufficient to warrant the conclusion that his testimony cannot be relied upon. Although repeatedly cautioned that if he did not remember the facts he should so state (Opposer's Rec., pp. 2720, 2728, 2729), he persistently answered "Yes" when asked as to certain facts, at the same time admitting that he remembered nothing about the matter (Opposer's Rec., pp. 2746, 2747, Qs. 293 to 297; p. 2726, Qs. 357, 358; p. 2727, Qs. 365, 366; p. 2733, Q. 429; p. 2739, Q. 473). He apparently attached no importance to the fact that he was testifying under oath.

In his testimony in the case of *State v. Rice*, although Mayfield was subjected to an extensive cross-examination relative to his various formulae and as to the business of The J. C. Mayfield Manufacturing Company, he said not a word about "Koke." That was in 1907. He testified that at that time the company was doing nothing except to supply the Celery Cola Company with its specialties, "Celery-Cola" and

“Pepsinola” (Plaintiff’s Rebuttal Exhibits 4, 5, 6 and 7).

In 1911 Mayfield learned that the Murfreesboro Bottling Works, of Murfreesboro, Tennessee, was carrying on some kind of a business under a registered trademark “Koke” (Applicant’s Rec., p. 789). Mayfield’s Company purchased that registration for a material consideration (Defendant’s Exhibit No. 67) without entering into any contest, although Mayfield claims to have used the name “Koke” as a distinguishing mark for his goods continuously since the year 1888. The earliest date of use alleged in the Murfreesboro registration is May 1, 1902 (Defendant’s Exhibit, No. 129). Mayfield admits that he took nothing from the Murfreesboro Bottling Works, as a result of this transaction, other than the certificate of registration. The business and formulae were not transferred (Applicant’s Rec., pp. 860 and 923).

In 1913 Mayfield was notified that an application for registration of the word “Koke” as a trademark for a nonalcoholic beverage was being prosecuted before the U. S. Patent Office by one William L. Bitting of Texas. Instead of contesting an interference with Bitting, whose earliest alleged date of use was November 10, 1898, Mayfield’s Company bought Bitting’s application and had the mark registered to the Koke Company of America as assignee (Applicant’s Rec., pp. 829, 830, 923; Defendant’s Exhibits No. 126 and No. 128). That applicant took nothing from Bitting in the nature of apparatus, labels, formulae or other tangible assets is admitted (Applicant’s

Rec., pp. 921, 922). Applicant purchased nothing but the bare application for trademark registration together with a label registration owned by Bitting (Defendant's Exhibits No. 126 and No. 127).

In the fall of the year 1910, the Koke Companies, of which Mayfield was president, filed applications for registration of "Koke" as a trademark in twenty or more states of the Union (Applicant's Rec., pp. 830 to 835). Certified copies of several of these applications for state registration are found in the record (Plaintiff's Rebuttal Exhibits No. 84 to No. 89). In each instance the application is verified by Mayfield and in no case did he allege a date of use earlier than June, 1909.

Although Mayfield claims to have manufactured and sold Koke continuously from 1888 up to the time when the Koke Company of America was organized in 1911 (Applicant's Rec., p. 808), including the period during which he was in business in Birmingham (Applicant's Rec., p. 785), the opposer has introduced as evidence in rebuttal the testimony of numerous witnesses to the effect that they were employees of Mayfield's Birmingham companies and that they never heard of "Koke" during that period of employment. These witnesses include Mayfield's salesmen, bookkeeper, stenographer, labeler, chemist, bottlers, bottle-washers, shipping clerk, delivery clerk, and draymen (See Opposer's testimony in rebuttal by Ellis, Barclift, Pogue, Moody, Hooper, W. M. Smith, Ensley, Dickson, Brewer, the Andersons, Crawford, Thomas, Bonham, Barrow, Bevell, and Garrett). Mayfield's St. Louis salesman, Leaver,

and his St. Louis chemist, Bohne, also disclaim any knowledge of Koke during their employment by the J. C. Mayfield Manufacturing Company in 1903 and 1904 (Opposer's Rec., pp. 1919, 1930).

The applicant has been unable to produce specimens of any labels, advertising, letter-heads, bills, or other physical exhibits, illustrating the manner in which "Koke" is alleged to have been used prior to the year 1909. As evidence in rebuttal, the opposer, by subpoena *duces tecum*, introduced a number of letters, envelopes, and other papers of the J. C. Mayfield Manufacturing Company and of the Celery Cola Company, of Birmingham, Nashville, and St. Louis, bearing letters signed by Mayfield and dated 1904, 1905 and 1906 (Plaintiff's Rebuttal Exhibits No. 11 to No. 60). In none of these papers does the word "Koke" appear, either in the heading or in the subject matter, although the name "Celery-Cola" is conspicuously set forth in most of them. That these letters are authentic is clearly established (Opposer's Rec., pp. 1556 to 1573, and p. 2765).

In one of the letters (Plaintiff's Rebuttal Exhibit No. 12 (which Mayfield admits (Opposer's Rec., p. 2765) having written to Pogue in 1905, he says, with respect to a case involving his Celery Cola:

"We must win this case for Celery-Cola is my all."

In 1909 Mayfield and others were prosecuted by the United States Government under the "Food and Drugs Act" on the charge of misbranding in connection with sales of Celery Cola in interstate commerce (177 Fed. 765). The charge appears to have been

based upon analyses by the Government chemists who found that Celery-Cola contained cocaine and caffeine. With reference to this prosecution and its effect Mayfield says:

“Well, that went down against us, under those conditions, against Celery-Cola, which virtually murdered it unjustly. My competitors used it against us and I saw it was an uphill pull to try to overcome a thing of that kind. Well, we had had a good trade on Celery-Cola and a good trade on Koke, a pretty fair trade on Pepsi-Nola, and I made up my mind then to give my entire time, push and energy to Koke, because it had not had the black eye that Celery-Cola had.”

(Applicant's Rec., p. 787.)

And again about this same matter Mayfield testified as follows:

XQ. 645. And then some you sent syrup to in barrels with labels on it, Koke labels on it?

A. I did not go into the syrup business very much until 1909 or '10, along there.

XQ. 646. That was when you went into the syrup business.

A. Yes, sir, largely into the Koke syrup business, that was when I had trouble with Celery-Cola and got a black eye, with cocaine in it, the Government found it and then I thought I would naturally have to overcome that and I pushed Koke.

XQ. 647. But Koke had been your biggest seller up to that time?

A. I would not say that.

XQ. 648. How was the proportion between Koke and Celery-Cola up to the time you dropped Celery-Cola practically and took on Koke exclusively?

A. Well, Koke from '88 to 1900, we sold more possibly.

XQ. 649. That Celery-Cola?

A. Celery-Cola for several years, I believe was in the lead.

XQ. 650. That is, up to this suit?

A. Up to this suit, and since then we have done more Koke business because we have pushed it.

(Applicant's Rec., page 872.)

It is the opposer's contention that Mayfield, and the companies in which he was interested, use the name "Koke," for the first time, after the Government prosecution, in 1909, with respect to the misbranding of Celery-Cola. It is the conclusion of this tribunal, however, and is so held, that Mayfield and his business associates did make some use of the word "Koke" as a name for a soda-fountain beverage during the period from 1888 to 1903, after which Mayfield became most active in his efforts to promote Celery-Cola, but that any trademark right which may have been acquired during that period prior to 1903 was clearly abandoned during the following period from 1903 to 1909. Such abandonment of any prior use which may have been made is held to be satisfactorily established by the evidence. Any other conclusion is deemed to be untenable in view of Mayfield's testimony in the case of *State v. Rice, supra*,

his affidavits in his applications for state registration, his purchase without contest of the Murfreesboro registration and the Bitting application, the absence of the word "Koke" in any of the letters and other papers introduced by Pogue (Plaintiff's Rebuttal Exhibits No. 11 to No. 64), his admission in a letter to Pogue in 1905 that Celery-Cola was "his all," and the testimony of the Birmingham and St. Louis employees of the Mayfield companies to the effect that they never heard of the word "Koke" during their employment. This evidence is all consistent with the conclusion that Mayfield had abandoned any use which he had previously made of "Koke" as a trademark and that he readopted the same in 1909 only because the Government prosecution against "Celery-Cola" discouraged him from thereafter attempting to market his goods under that name.

That the applicant acquired nothing by the purchase of the bare trademark registration and application for registration, one from Murfreesboro Bottling Works and the other from Bitting, cannot be seriously questioned. It is so well settled that a trademark cannot be transferred, independently of the business and goodwill in connection with which it has been used, as to render further discussion or the citation of authorities unnecessary.

The ruling which has been made herein, to the effect that applicant's predecessors made some use of the mark "Koke" and abandoned the same prior to its readoption by Mayfield in 1909, is of substantially the same effect in deciding this case as though it had been ruled, in accordance with opposer's contention,

that the mark had never before been used. In 1909 it was too late for applicant to acquire the right to use "Koke" as a trademark (*Stachelberg et al. v. Ponce, Corbin v. Gould, Denver Chemical Mfg. Co. v. Lilley et al., supra*). At that time it was already, as established by the record in this case, a common nickname, throughout certain sections of the country, for opposer's goods. Moreover, according to applicant's own contention, the word "Koke" was then in common use, in many localities, as a generic name for any one of a large number of cola beverages which alone would clearly bar applicant's right to register.

The opposer contends, and has introduced a large amount of evidence as proof, that the applicant has resorted to unfair and unlawful methods of marketing its goods as a competitor; that it has imitated opposer's product and the containers in which it is distributed and sold; that it has sought to induce retailers to wilfully and intentionally substitute and sell its product as that of the opposer; and that it has persistently harrassed those who will not do so. On the other hand, the applicant has submitted evidence to the effect that the opposer has attempted to monopolize the market and has resorted to threats and intimidating measures to prevent the sale by competitors of any product similar to Coca-Cola. Whether these alleged facts are material to the issues which have been raised in the court proceedings, in which the testimony submitted for use in deciding this case is also entitled is a matter with which this tribunal is not concerned. Such testimony is deemed to be entirely irrelevant to any issue which is prop-

erly raised for determination by the notice of opposition and has therefore been disregarded in deciding this case.

The opposition of The Coca-Cola Company is sustained, and it is adjudged that the applicant, Koke Company of America, is not entitled to the registration for which it has made application.

Limit of appeal: June 24, 1916.

H. E. STAUFFER,
Examiner of Interferences.

May 24, 1916.

[On reverse side:] 132,602/17. M. H. M. E. K.

**Certified Copy of Decision of Commissioner of U. S.
Patent Office in Coca-Cola Co. v. Koke Co., No.
1424.**

2—390.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of the Decision of the Commissioner, dated August 14, 1917, in the matter of

Opposition Number 1,424,
The Coca-Cola Company,
vs.

Koke Company.

Trademark for Refreshing Non-Alcoholic Beverage not in the Nature of a Food and a Soda Fountain Syrup.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 8th day of September, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-second.

[Seal]

R. F. WHITEHEAD,

Acting Commissioner of Patents.

Recorded Vol. 123, Page 416.

Opp. No. 1424.

Paper No. 111.

J. R. S.

Hearing,

July 27, 1916.

IN THE UNITED STATES PATENT OFFICE.

The Coca-Cola Company,

vs.

Koke Company.

Opposition No. 1424.

Appeal from Examiner of Interferences.

Trademark for Refreshing Non-Alcoholic Beverage not in the Nature of a Food and a Soda Fountain Syrup.

Application of the Koke Company filed June 23, 1913, No. 71,308, published December 9, 1913.

Messrs. HAROLD HIRSCH and FRANK F. REED & EDWARD S. ROGERS, and Messrs. F. L. BROWN and FRANCIS M. PHELPS, for the Coca-Cola Company.

Mr. F. T. H. JOHNSON, for the Koke Company.

There has been much litigation bearing upon the matter here presented. In *United States vs. Coca-Cola Company*, 241 U. S. 265, decided about a year ago, the case was remanded for further proceedings. The outcome of this case may affect the right of the company to apply the name "Coca-Cola" to its product which, I think, would affect the standing of the opposer. But this suit has not according to my latest information, though now under negotiation, been finally disposed of.

Of more direct bearing upon the issues here presented are two district court decisions. The first is the decision of Judge Sawtelle of the District Court of Arizona. The opinion is found in the brief of the Coca-Cola Company before the Commissioner, page 85. The decree was dated September 16, 1916. I understand that the appeal has not been disposed of.

The second decision was in the District Court for the Eastern District of Louisiana. The decree, by Judge Foster, is dated May 24, 1917, and a certified copy was filed with me on the first day of June, 1917.

In each of these decrees there are findings of fact that the word "Koke" is an abbreviation of the name "Coca-Cola" used by the public and by purchasers in designating coca-cola; that the Koke Company of America, and its predecessor, did not adopt or use the name "Koke" until the year 1909; and that it was adopted and used with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company.

In the brief for the Koke Company it is urged that

the injury alleged by the opposer must arise from a mark which falls within the inhibition of Section 5 of the Trademark Act. A motion was made by the applicant to dismiss the opposition for failure to state a cause of action. This motion was denied by the First Assistant Commissioner in an opinion dated January 13, 1915 (see Schedules referred to in the brief for the Coca-Cola Company, page 101).

I agree with the contention by the opposer that the mark sought to be registered is not a mark by which the goods of the owner of the mark may be distinguished from other goods of the same class; that it is in fact a mark by which, partly because of popular usage, the goods of the applicant would be confused with the goods of the opposer and that the opposer would therefore be injured by the registration of the mark within the meaning of the statute.

This disposes of the contention by the applicant that the opposer's case must fall because merely an allegation of unfair competition.

The opposer was permitted to amend his notice of opposition. (See the opinion of the First Assistant Commissioner dated September 5, 1914, in the Schedules in the brief for the Coca-Cola Company, page 145.) I agree with the First Assistant Commissioner that the purport of the original and amended notice is broadly the same and set forth in effect the same grounds of opposition.

While it is true that opposition proceedings under the statute are intended to be summary and the rule is therefore strict respecting the time within which

they may be brought and respecting amendments after the statutory period has expired, yet I can see no reason for overturning the deliberate action of the office upon this point. Moreover, it would make little difference in the outcome so far as the Koke Company is concerned whether the point that the word "Koke" is not a distinctive name of the applicant's goods is pressed by an opposer or raised by the office of its own motion as a reason for refusing registration.

The finding of fact as to the use of the name "Koke" arrived at by the examiner of interferences is somewhat different from that by the district courts indicated above. I do not think the difference in the conclusion reached by the examiner of interferences and by the courts important, in view of the showing as to the popular use of the word "Koke" whether as a nickname for "Coca-Cola," as insisted by the opposer, or as a slang name for a whole class of syrups in which caffeine is an ingredient, as contended by the applicant. In any event, the word fails to distinguish applicant's product. Nothing but a clear showing of continuous use, beginning before the word became common on the lips of the public, could justify the office in registering it.

In fact, it is not seen why anyone should wish to adopt such a trademark unless it were to justify the retailer in selling his goods on the ground that they were called for when, in fact, the customer had no such thought in mind in asking for a "Koke."

There is in truth much testimony to which atten-

tion is called in the brief filed on behalf of the Koke Company to just this general effect. I refer to the testimony cited or quoted on pages 167 et seq., under the caption "The nickname or slang expression 'Koke' does not indicate or designate opposer's product exclusively—hence opposer will not be 'damaged' by the registration."

Of the cases cited the one which seems to me to come the closest is what is known as the "Denver Mud" case (Denver Chemical Manufacturing Co. vs. Lilley, 216 Feb. Rep. 869).

This, of course, was not a case of opposition or a question of registration. It did not involve the question whether "Denver Mud" was a proper trademark. It was merely a case of unfair competition. It was claimed by the appellant, who was the manufacturer of antiphlogistine, that if a customer should go into almost any drug-store in almost any part of the globe and ask for "Denver Mud" he would be handed a can of antiphlogistine.

It was specifically held that the term "Denver Mud" was applied by the public to plastic dressings before antiphlogistine was placed on the market. Under this state of facts the conclusion was reached that the owners of the mark "Antiplogistine" had not made out a case of unfair competition.

In the case at bar, however, the question is distinctly presented whether one has the right to adopt as his trademark the popular pseudonym for the goods which he sells. The answer must be in the negative.

The Examiner of Interferences is sustained.

THOMAS EWING,
Commissioner.

August 14, 1917.

[On reverse side:] 132,602/17.

Court of Appeals of the District of Columbia.

No. 1151, Patent Appeal Docket. October Term,
1917.

THE KOKE COMPANY OF AMERICA,
Appellant,

vs.

THE COCA-COLA COMPANY.

**Certified Copy of Decree of Dismissal of Court of
Appeals of District of Columbia in Koke Co. of
America v. Coca-Cola Co.**

Subject Matter: Trademark for Refreshing Non-
Alcoholic Beverage not in the Nature of a Food
and a Soda Fountain Syrup.

Opposition No. 1424.

Appeal from the Commissioner of Patents.

It appearing to the Court that the time within
which the parties are required to deposit the amount
for printing the record in this cause having elapsed,
and they having failed to deposit the same,—

IT IS THEREFORE, in pursuance of the 19th
rule of this court, now here ordered and adjudged

by this court that this appeal be, and the same is hereby, dismissed.

Per MR. CHIEF JUSTICE SMYTH,
January 5, 1918.

A true copy.

[Seal] Test: HENRY W. HODGES,
Clerk of the Court of Appeals of the District of
Columbia.

[Endorsed]: No. 1151. Court of Appeals of the
District of Columbia. October Term, 1917. Order
of Dismissal. Court of Appeals, District of Colum-
bia. Filed Jan. 5, 1918. Henry W. Hodges, Clerk.

*United States District Court, Eastern District of
Louisiana.*

No. 15,064.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE SOUTHERN KOKE COMPANY, LTD.,
CRESCENT CITY SELTZ & MINERAL
WATER COMPANY, JAMES L. WRIGHT
and J. C. MAYFIELD,

Defendants.

**Certified Copy of Decree of U. S. District Court,
Eastern District of Louisiana, in Coca-Cola Co.
v. Southern Koke Co. et al.**

This cause came on to be heard and was argued
by counsel, and thereupon, upon consideration
thereof, for the reasons orally assigned, with the

reservation of the right to reduce same to writing, in the event of an appeal herein,

IT IS ORDERED, ADJUDGED AND DECREED:

(1) That the Court has jurisdiction of the subject matter and of the parties to the suit.

(2) That the word "Coca-Cola" is a valid trademark.

(3) That plaintiff is the owner of and alone entitled to use the trademark "Coca-Cola" and that its goods alone can lawfully be sold under that name.

(4) That the words "Koke" and "Dope" are each an abbreviation of the word "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product "Coca-Cola."

(5) That the defendant, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909, and that the defendants had and have no right to its use.

(6) That the defendants have no interest in or claim to the trademark "Coca-Cola," the Coca-Cola business or formula and the defendants claim of interest in the Coca-Cola business, the trademark "Coca-Cola" and knowledge of the Coca-Cola formula are without foundation.

(7) That the words "Koke" and "Dope" were adopted and used by the defendants with the deliberate purposes of representing their goods to be the product and manufacture of The Coca-Cola Company.

(8) That the defendants' salesmen were instructed to sell and did sell defendants' product

under the names "Koke" and "Dope" as and for Coca-Cola.

(9) That the defendant, James L. Wright, was not connected with the Southern Koke Company herein referred to in the bill of complaint at the time of the filing of bill of complaint; therefore, injunction is not granted against him.

(10) That the defendants, except as above, and each of them, have infringed the plaintiff's trademark and have been guilty of unfair competition with the plaintiff.

(11) That defendants, The Southern Koke Company, Crescent City Seltz & Mineral Water Company, and each of them, their officers, servants, agents, employees, attorneys, licensees, transferees and assigns, and each and all thereof, and all acting by or under their authority and J. C. Mayfield, his heirs, assigns and all persons claiming under or through him be, and they are each and all perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-Cola," or any like word, or the word "Koke," or any like word, or the word "Dope," or any like word; from claiming or asserting any right in the name "Koke" or in the name "Dope," or interfering or threatening any prosecution or interference with the use thereof as short names or nicknames of plaintiff's produce, Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like

the labels, designs or devices of the plaintiff, or the labels, designs or devices used by the defendants and referred to in the bill of complaint herein; from using in connection with the sale or shipment of any product not the plaintiff's barrels or receptacles colored in imitation of the plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by defendants, or any of them, is made from the same formula as Coca-Cola syrup, or that defendants, or any of them, know or may rightfully use or employ the Coca-Cola formula; from claiming any interest in or having had an interest in the Coca-Cola business, from claiming any knowledge of the Coca-Cola formula; from coloring any product not the plaintiff's in imitation of or like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of defendants and not of the plaintiff, and further, from doing any act or thing, or using any name or names, devices, artifices or contrivances, which may be calculated to represent that any product not of plaintiff's production is the genuine Coca-Cola of plaintiff and that writs of perpetual injunction issue accordingly.

(12) That defendants, and each of them, may be required to account to plaintiff for any and all profits derived by them or any or either of them, and to pay the plaintiff such damages as it may have sustained by reason of the unlawful conduct of defendants and each of them, and that in the event the parties do not agree as to the amount, this cause be referred to a Master in Chancery of this Court,

to take and state an accounting to the plaintiff for any and all such profits and any and all of said damages, with full power to subpoena and order the attendance of witnesses, the taking of depositions and the production of books, papers and documents pertinent to the taking and stating of said account for profits and damages and to report said account and statement of profits and damages aforesaid as by law provided.

(13) That defendants pay the costs of this suit to be taxed, and that upon taxation plaintiff have execution therefor.

(Signed) RUFUS E. FOSTER,
Judge.

May 24, 1917.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

WITNESS, my hand and the seal of the said Court, at the city of New Orleans, La., this 7th day of September, A. D. 1917.

[Seal]

H. J. CARTER,
Clerk.

By Hy. J. Loisel,
Deputy Clerk.

[Endorsed]: No. 15,064. U. S. District Court, Eastern District of Louisiana, New Orleans Division. The Coca-Cola Company vs. The Southern Koke Company, Ltd., Crescent City Seltz & Mineral Water Company, James L. Wright & J. C. Mayfield. Copy of Decree Granting Perpetual Injunction, etc.

In the District Court of the United States of America, Eastern District of Tennessee, Southern Division.

No. 53.

UNITED STATES

vs.

FORTY BARRELS AND TWENTY KEGS OF
COCA COLA.

**Certified Copy of Decree of District Court, Eastern
District of Tennessee, Southern Division, in
United States v. Forty Barrels and Twenty
Kegs of Coca-Cola.**

This proceeding coming on to be heard, and it appearing that the claimant, The Coca Cola Company, without admitting the charges of either misbranding or adulteration, but expressly denying same, but stating that it has made certain modifications in the process of its manufacture, and on account of which a decision either way of the question of fact now involved would not be conclusive in any future proceeding against its present product, has, in order to dispose of this libel without the necessity of another trial, and for the sole purpose of disposing of this cause, withdrawn its claim and all other pleadings therein, and it appearing that the United States and said claimant, by their attorneys of record, have consented to the judgment herein;

And it appearing that the monition issued in this case has been heretofore returned, the usual proclamation made, all legal requirements complied with

and that the default of all persons has been duly entered after withdrawal by claimant of this claim and defenses as aforesaid;

NOW, THEREFORE, the premises considered, it is, on motion of the United States, ORDERED, SENTENCED AND ADJUDGED by the Court, now here, and his Honor, the District Judge, by virtue of the power and authority in him vested, doth hereby order, sentence and adjudge that the goods, wares, and merchandise seized in this proceeding be, and the same are hereby forfeited to the United States and that the said The Coca Cola Company pay all costs of this proceedings;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment of forfeiture shall not be binding upon the said The Coca Cola Company or its product except as to this cause and the particular goods seized herein, nor binding upon the claimant or its product as it shall relate to any other cause or proceeding of any kind or character.

AND IT IS FURTHER ORDERED that the said goods, wares or merchandise seized herein, to wit, the forty barrels and twenty kegs of Coca Cola, shall be released to the claimant upon said claimant paying the costs above adjudged and giving sufficient bond, conditioned that the product shall not be sold or otherwise disposed of contrary to the provisions of the Federal Food and Drugs Act, or the laws of any State, Territory, district, or Insular possession of the United States.

In open court, this 12th day of November, 1918.

(Signed) SANFORD,

United States Judge.

O. K.—WM. L. FRIERSON,

Asst. Atty. General.

W. T. KENERLY,

U. S. Atty.

J. B. SIZER,

Atty. for Coca-Cola Co.

HAROLD HIRSCH,

Attorney for the Cola Cola Co.

[Endorsed]: No. 53. United States District Court, Eastern District of Tennessee, Southern Division. The United States versus 40 Barrels and 20 Kegs of Coca Cola. Agreed Order of ——. Dismissal at Defendant's Cost. 12th day of November, 1917. Ent'd Minute Book ——. Horace Van Deventer, Clerk. By Geo. E. Gresham, 10 A. M., Dep. Clk.

The United States of America,
Eastern District of Tennessee,
Southern Division,—ss.

I, Horace Van Deventer, clerk of the District Court of the United States, within and for the District aforesaid, do hereby certify that the foregoing printing and typewriting is a true, full, correct and complete copy of the original final decree on file and remaining of record in my office in the matter of The United States v. 40 Barrels and 20 Kegs of Coca Cola, No. 53.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of the said District Court, at Chattanooga, Tennessee, this 20th day of April, A. D. 1918.

HORACE VAN DEVENTER,
Clerk.
By Geo. E. Gresham,
Deputy Clerk.

[Endorsed]: No. 53. United States District Court, Eastern District of Tennessee, Southern Division. The United States versus 40 Barrels and 20 Kegs of Coca Cola. Certified Copy Final Decree.

**Certified Copy of Opinion of Hollister, D. J., in
Coca-Cola Co. v. Duberstein, etc., et al.**

The United States of America,
Southern District of Ohio,
Western Division,—ss.

At a stated term of the District Court of the United States, within and for the Western Division of the Southern District of Ohio, begun and held at the city of Dayton, in said District, on the first Monday in November, being the fifth day of said month, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-second, to wit: On Tuesday the 19th day of March, A. D. 1918. Present: The Honorable HOWARD C. HOLLISTER, Judge.

Among the proceedings then and there had were the following, to wit:

*District Court of the United States, Southern
District of Ohio, Western Division.*

No. 13 (Dayton).

THE COCA-COLA COMPANY,

Complainant,

vs.

BENJAMIN DUBERSTEIN, Doing Business as
DAYTON MINERAL WATER COMPANY
et al.,

Defendants.

Beginning in 1886 complainant's predecessors had built up a large business in a syrup in which there was an infusion of an extract of coca shrub and of cola nuts, the latter made after, it is said, the cocaine is extracted from them. The syrup is the basis of a nonintoxicating beverage made by combining it with carbonated water. Since 1892, the complainant has been the exclusive owner and proprietor of the business. The product was named "Coca-Cola" at the beginning and the beverage has been known under that name for more than thirty years. By the expenditure of millions of dollars in advertising it has become well known throughout the land. The name means, and is understood by the public to mean, complainant's product.

The name was registered in 1893 in the Patent Office, and again in 1895, in pursuance of the act of Congress of that year, was registered. The bottles

in which it is sold are of uniform size and appearance, with the name "Coca-Cola" blown in them, and the caps of the bottles bear the trademark.

The defendant, Duberstein, a bottler of soft drinks at Dayton, Ohio, under the name of Dayton Mineral Water Co., bottles a product purchased by him from one John D. Fletcher, who calls his product, "John D. Fletcher's Carbonated Syrup, a Genuine Coca and Cola Flavor." He was the president of the Nashville Syrup Co., enjoined from making and selling "Fletcher's Coca-Cola" (215 Fed. 527, C. C. A. 6). The bottles in which Duberstein sells the product to the other defendants, saloon-keepers, etc., at Dayton and vicinity, are approximately of the same size as Coca-Cola bottles, and in them is blown the words "Coca and Cola." The "and" is in small type, and the "Coca," "Cola" in script imitating the script of the genuine Coca-Cola trademark.

The defendant Coshocton Glass Co. is the maker of bottles for Duberstein.

The validity of complainant's trademark as the exclusive property of complainant has been established in a number of cases elsewhere and in this circuit. (Coca-Cola Co. v. Nashville Syrup Co., 200 Fed. 153; 215 Fed. 527, C. C. A. 6.)

Defendant's product is colored to an exact imitation of the color of complainant's by the use of caramel which serves no other purpose. The cap on defendant's bottles contains the name "Coca and Cola" in red, with other descriptions indicating that the contents is a flavor of Coca and Cola. There is no trace of the coca shrub or cola nuts or coca leaves in

it. The testimony shows conclusively that it was intended to deceive the consuming public and in many proved instances did deceive; but aside from this, the appearance, coloring, size, caps, the delivery slips, the name "Coca and Cola" blown in the bottle, make the product on its face a fraud on the complainant and on the public. The complainant is entitled to an injunction against all the defendants in accordance with its prayer, and for an accounting.

During the progress of the case, Duberstein sold his product as "El-Cola" in the same bottles in which he had been selling "Coca and Cola," covering the words "Coca and Cola," blown thereon, by a diamond-shaped label pasted thereover, on which was printed in large type in white on a diamond-shaped black background, "El-Cola."

By pasting on the label, Duberstein would change his "Coca and Cola" product to "El-Cola," and thereby escape the condemnation he evidently expected "Coca and Cola" would receive in this case. Thereby he is charged by complainant with contempt of court.

This is illustrative of a strange lack of perception on the part of defendant, Duberstein, and by many, as the decisions show, in cases of infringement of trademark and unfair competition, that the courts deal with matters of substance rather than of form and that the odor of fraud is difficult to remove. This case reeks with it. Why does the defendant use the word "Cola" at all? And why color its product as it does? And why adopt the same size of bottle? The only purpose is to appropriate a part of the

value of complainant's trademark and goodwill.

Pasting the label "El-Cola" affords no protection to defendant's illegal act. These bottles are in contact with ice and water all the time while waiting for use. Aside from the instances proved of the labels having become detached, their liability to become detached is so great as not to afford protection even if their permanency would be a protection. *Prest-O-Lite Co. v. Davis*, 209 Fed. 917, aff'd 215 Fed. 349 (C. C. A. 6); *Prest-O-Lite Co. v. Bogen*, 209 Fed. 915; *Prest-O-Lite Co. v. Avery Lighting Co.*, 161 Fed. 648; *Evans v. Von Laer*, 32 Fed. 153; *Wood v. Burgess* (1890), 59 Law Jour., N. S., 11; *Thwaites & Co. v. M'Evilly*, 20 Rep. Pat. Cas. 663, aff'd 21 Rep. Pat. Cas. 397, 401, 402.

It is also proved that defendants' "El-Cola" is palmed off by dealers as "Coca-Cola."

But the label, if permanent, affords no protection. "El-Cola" is in itself an infringement of complainant's trademark "Cola-Cola." Complainant has cited more than twenty-five applicable decisions.

In addition to the injunction plaintiff may take an order finding Duberstein guilty of contempt, the punishment to be determined when the formal order is taken.

(Signed) HOLLISTER,
District Judge.

MATTHEWS & MATTHEWS, HAROLD
HIRSCH, FRANK F. REED, EDWARD S.
ROGERS,

For Complainant.

DALE & KUSWORM,

For Defendant, Benjamin Duberstein.

The United States of America,
Southern District of Ohio,
Western Division,—ss.

I, B. E. Dilley, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and correct copy of the original opinion filed in the case of The Coca Cola Company, vs. Benjamin Rubenstein, doing business as Dayton Mineral Water Company, et al., No. 13 (at Dayton)—In Equity, as the same appears on file and of record in the office of the Clerk of said Court, in the therein entitled cause.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, in the City of Dayton, Ohio, this 6th day of April, A. D. 1918.

[Seal]

B. E. DILLEY,
Clerk.

By Henry H. Hollencamp,
Deputy.

[Endorsed]: No. 13 (at Dayton). United States District Court, Southern District of Ohio, Western Division. The Coca Cola Company vs. Benjamin Duberstein, doing business as Dayton Mineral Water Company, et al. Certified Copy of Opinion.

**Certified Copy of Decree in Coca-Cola Company v.
Duberstein, etc., et al.**

The United States of America,
Southern District of Ohio,
Western Division,—ss.

At a stated term of the District Court of the United States, within and for the Western Division of the Southern District of Ohio, begun and held at the city of Dayton, in said District, on the first Monday in November, being the fifth day of said month, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-second, to wit: On Monday, the 1st day of April, A. D. 1918. Present: The Honorable HOWARD C. HOLLISTER, Judge.

Among the proceedings then and there had were the following, to wit:

*District Court of the United States, Southern
District of Ohio, Western Division.*

IN EQUITY—No. 13 (at Dayton).

THE COCA-COLA COMPANY,

Complainant,

vs.

BENJAMIN DUBERSTEIN, Doing Business as
DAYTON MINERAL WATER COMPANY
et al.,

Defendants.

This cause came on to be heard at this term and was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows:

That the name "Coca-Cola" is a good and valid trademark and is the exclusive property of the complainant and means and is understood to mean complainant's product and nothing else. That the defendants, by the use of the names "Coca and Cola" and "El-Cola" have infringed said trademark and have been guilty of unfair trading with complainant.

That the defendants Benjamin Duberstein, doing business as Dayton Mineral Water Company; Martin Hornung, George Soto, Peter Kolleda, Joseph F. Waltz, C. J. Stumpf and C. A. Stumpf, doing business as Stumpf Brothers; and A. L. Hart and W. F. Hart, doing business as A. L. Hart and Son, their officers, agents, servants, employees, attorneys, licensees and assigns, all holding by, through or under them and each of them be and they are hereby perpetually enjoined and restrained from using, in connection with the manufacturing, distributing, advertising, offering for sale or the sale of any product not being the genuine product of the complainant, the name "Coca-Cola" or any like words, "Coca and Cola" or "El-Cola" or any like or similar words or names and further from doing any act or thing or using any name, device, get-up or contrivance which may be calculated to deceive or likely to induce the belief that an article not the complainant's is the complainant's.

And that the defendants and each of them are per-

petually enjoined and restrained from offering for sale or selling "Coca and Cola" or "El-Cola" or any product under any like name or words as hereinbefore described, on demands or calls for "Coca-Cola."

That The Coshocton Glass Company, its officers, agents, servants, employees, attorneys, licensees and assigns, all holding by, through or under it, be perpetually enjoined and restrained from manufacturing any bottle and from selling any bottle with the name "Coca and Cola" thereon and from manufacturing or selling any bottle with the name "El-Cola" or any other like term, name, word or words thereon, and from manufacturing and selling any bottle with a name or device thereon which is a colorable imitation of the trademark of the complainant.

And it is further ordered, adjudged and decreed that the complainant do recover of the defendants the profits, gains and advantages which said defendants or any of them have received or made or which have arisen or accrued to them by the manufacture, use or sale of the infringing product hereinbefore described, and that the complainant do recover from the defendants or each of them the damages resulting therefrom.

And it is further ordered, adjudged and decreed that the said complainant do recover of the defendant Benjamin Duberstein, its costs, charges and disbursements in this suit to be taxed.

It is further ordered, adjudged and decreed that the defendant Benjamin Duberstein, doing business as Dayton Mineral Water Company, deliver to the complainant all bottles, labels, cases and advertising

matter or other printed matter including sales slips, sales books or other matter of any kind and description in his possession or in the possession of any agent, servant, employee, licensee or assign bearing the words "Coca and Cola" or "El-Cola" or any like name, term, word or words.

And it is further ordered, adjudged and decreed that this cause be referred to J. Q. A. Johnson, Jr., who is appointed a Commissioner of this Court to ascertain and take and state and report to this Court an account of the sales of "Coca and Cola" and "El-Cola" sold and marketed by the defendant Benjamin Duberstein, and also the gains, profits, and advantages which said defendant, Benjamin Duberstein, has received or which have arisen or accrued to him from infringing the exclusive rights of the complainant by the manufacture, use or sale of said product and the damages which said complainant has suffered by said infringement.

It is further ordered, adjudged and decreed that said Commissioner shall ascertain, take, state and report to this Court the gains, profits and advantages which the other defendants, to wit, Martin Hornung, George Soto, Peter Kolleda, Joseph F. Waltz, C. J. Stumpf and C. A. Stumpf, doing business as Stumpf Brothers; A. L. Hart and W. F. Hart, doing business as A. L. Hart and Son, have received or which have arisen or accrued to them from infringing the exclusive rights of the complainant by the use and sale of said products and the damages which complainant has suffered by said infringement.

And it is further ordered, adjudged and decreed that the complainant on such shall have the right to cause the examination of the said defendants, their agents, servants, employees, licensees and assigns, *ore tenus* or otherwise, and also the production of the books, vouchers, checks, documents and all papers whatsoever of every kind and description of the said defendants and that said defendants, their agents, employees, servants, licensees or assigns attend for such purposes before said Master from time to time as said Master shall direct.

It is ordered, adjudged and decreed that the defendant Benjamin Duberstein is guilty of contempt of this Court for disobedience of the preliminary injunction heretofore issued and that he shall be punished for said contempt as the Court may hereafter decree.

HOLLISTER, Judge,
District Judge United States District Court Southern District of Ohio, Western Division.

Approved:

_____,
_____,

Solicitors for Complainant,

Approved:

Solicitors for Defendant.

The United States of America,
Southern District of Ohio,
Western Division,—ss.

I, B. E. Dilley, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing

is a true and correct copy of the original entry filed in the case of The Coca-Cola Company vs. Benjamin Duberstein, doing business as Dayton Mineral Water Company et al., No. 13 (at Dayton) in Equity, as the same appears on file and of record in the office of the Clerk of said Court, in the therein entitled cause.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, in the city of Dayton, Ohio, this 6th day of April, A. D. 1918.

[Seal]

B. E. DILLEY,
Clerk.

By Henry H. Hollencamp,
Deputy.

[Endorsed]: No. 13 (at Dayton). United States District Court, Southern District of Ohio, Western Division. The Coca-Cola Company vs. Benjamin Duberstein, doing business as Dayton Mineral Water Co. et al. Certified Copy of Entry.

Registry Card.

Article No. 831526, 191
...class postage paid.

RECEIVED AND REGISTERED

From F. F. Reed & E. S. Rogers,
Gas Bldg.

Addressed to R. E. Sloan,
Phoenix, Ariz.

Return receipt desired....

Delivery restricted:

To addressee in person..

To addressee or order....Postmaster, per W.

[Stamped Postmark]: Chicago, Ill. Registered.
Apr. 27, 1918.

RECEIVED AND REGISTERED

Article No. 831527, 191

...class postage paid.

From Do.

Addressed to A. B. Littleton,

Chattanooga, Tenn.

Return receipt desired....

Delivery restricted:

To addressee in person..

To addressee or order....Postmaster, per F.

[Stamped Postmark]: Chicago, Ill. Registered.
Apr. 27, 1918.

[Endorsed]: No. 3012. U. S. Circuit Court of Appeals, for the Ninth Circuit. Koke Company of America, Southern Koke Company, Ltd., Koke Company of Texas, Koke Company of Arkansas and Koke Company of Oklahoma, Appellants, vs. The Coca-Cola Company, Appellee. Petition. Filed May 7, 1918. F. D. Monckton, Clerk.